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No. 84-___

In the Supreme Court

OF THE

United States

OCTOBER TERM 1984

MORTON P. MACLEOD,
Petitioner,

VS.

COUNTY OF SANTA CLARA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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6 HPP

QUESTIONS PRESENTED FOR REVIEW

1. Where a county has prohibited development of private property and its historic use is not economically viable, may the county, consistent with the Fifth Amendment, also prevent the only available use able to cover the costs of maintenance, operation and taxes—in this case, timber harvesting—without compensating the owner for at least the net income from that use?

2. Is mere ownership of property an "economically viable use" sufficient to preclude a finding of unconstitutional taking, even when regulation has cut off all the property's sources of income?

PARTIES

Petitioner is an individual, Morton P. MacLeod. Respondent is the County of Santa Clara, a political subdivision of the State of California.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting Certiorari	4
I.	
The opinion below disregards, and typifies the tendency of lower courts to disregard, the standards established by this Court	6
II.	
The allowable uses of property, and not the possibility that other uses may be permitted in the future, should determine whether there has been a taking	10
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases

Page

Agins v. Tiburon, 447 U.S. 255 ..... 5, 6, 11
Chicago, R. I. & P. Ry. Co. v. United States, 284 U.S. 80 11
Dirt, Inc. v. Mobile County Com'n, 739 F.2d 1562 9
Euclid v. Ambler Co., 272 U.S. 365 9
Goldblatt v. Hempstead, 369 U.S. 590 10
Hadacheck v. Sebastian, 239 U.S. 394 9
Hamilton Bank v. Williamson Cty. Reg. Planning Comm., 729 F.2d 402, cert. granted, 53 U.S.L.W. 3202 10
Kaiser Aetna v. United States, 444 U.S. 164 ..... 6, 10, 11
Kirby Forest Industries, Inc. v. United States, ____ U.S. ____, 104 S. Ct. 2187 ..... 5, 6
Lake Country Estates v. Tahoe Planning Agcy., 440 U.S. 391 1
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 ..... 6, 11
Lynch v. Household Finance Corp., 405 U.S. 538 11
Maher v. City of New Orleans, 516 F.2d 1051, cert. denied, 426 U.S. 905 ..... 8, 9
MacLeod v. Santa Clara County, 749 F.2d 541 ..... passim
MacLeod v. Superior Court, 179 Cal. Rptr. 520 3
Ortega Cabrera v. Municipality of Bayamon, 562 F.2d 91 ..... 8, 9
Penn Central Transp. Co. v. New York City, 438 U.S. 104 ..... passim
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 ..... 11, 12
Pompa Constr. Corp. v. City of Saratoga Springs, 706 F.2d 418 ..... 8, 9
Sadowsky v. City of New York, 732 F.2d 312 8
San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 10
Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 10

TABLE OF AUTHORITIES CITED

CASES

Page

William C. Haas v. City & Cty. of San Francisco, 605 F.2d 1117, cert. denied, 445 U.S. 928 9

Yuba Goldfields, Inc. v. United States, 723 F.2d 884 10

Constitution

United States Constitution

Fifth Amendment (Just Compensation Clause) 2

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

42 U.S.C. § 1983 ..... 2, 4

Other Authorities

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165 (1967) 9

Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S.Cal. L. Rev. 561 (1984) 9

No. 84-___

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OCTOBER TERM 1984

MORTON P. MACLEOD,
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COUNTY OF SANTA CLARA,
Respondent.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit was reported at 749 F.2d 541, and is printed as Appendix A hereto. The judgment, unpublished memorandum opinion and order of the district court are printed as Appendix B. The court of appeals' order denying rehearing is printed as Appendix C.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.[1] The opinion of the Court of Appeals for the Ninth Circuit was filed and entered on December 10, 1984 (App. A, p. 1), and a timely petition for rehearing was denied on January 22, 1985 (App. C, p. 46). This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

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[1] *See Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 398-400 (1979).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution: "[N]or shall private property be taken for public use, without just compensation."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner Morton P. MacLeod seeks certiorari to review a decision of the Court of Appeals for the Ninth Circuit which holds that he did not suffer a taking even though he was prohibited from making any gainful use of several thousand acres and left only the "right" to hold the property at a loss. The court of appeals equates mere ownership of property with its economically viable use and thus frustrates any limitation on the extent to which the use of private property may be regulated.

In 1977, petitioner acquired three adjoining ranches, totalling about 8300 acres, in respondent County.[2] The previous owner had raised cattle on the property.

Petitioner found that cattle grazing did not cover the minimum costs necessary for that operation, much less petitioner's actual costs (App. B, pp. 19-20). Revenues from a grazing lease did not even cover property taxes (App. B, pp. 19-20). The district court found that petitioner could never have supported the ranches on

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[2] The ranch properties were held by a corporation that petitioner owned, and to which he is the successor in interest. *See* App. B, pp. 28, 30-31.

cattle income (App. B, pp. 29-30). Petitioner attempted a farming operation but there was not an adequate water supply, even though petitioner spent over $100,000 in attempting to locate a well for irrigation (App. B, p. 20). A harvest of hardwood was also unprofitable and could not be repeated for forty years (App. B, p. 20).

Petitioner sought permission to subdivide one of the ranches into single-family residence parcels averaging 43 acres each (App. B, p. 20). The subdivision plan was rejected by the County, and the district court found that any effort to develop the other ranches "would likely have been doomed to similar failure" (*id.*).

Petitioner's property did possess over eight million board feet of redwood timber, with an immediately harvestable volume of 2.5 million board feet (App. B, p. 21; App. A, p. 3). The district court found that redwood timber harvesting would have yielded an annualized income of approximately $82,000 (App. B, p. 22)—enough to meet the minimal expenses of operation and maintenance of the property (App. B, pp. 29-30). Petitioner secured the approval of the California Department of Forestry (App. B, p. 21), and made application for a County use permit (App. B, p. 22). The County's Board of Supervisors denied the use permit on the basis of findings that the proposed harvest operation could harm the environment (App. B, p. 24). The permit denial was ultimately upheld by the California Court of Appeal, which found no evidence to support the Board's findings but held that the Board was nonetheless entitled to disbelieve petitioner's evidence (App. B, p. 26; *see MacLeod v. Superior Court*, 179 Cal. Rptr. 520, 528-30 (1981)).[3] Final denial of the harvest permit left petitioner with no economically viable use of the ranches.

In the meantime, heavy ownership and operating costs had forced petitioner to sell the ranch lands. Petitioner suffered a net loss on the sale, since his costs of acquiring and holding the ranches exceeded the sale price (App. B, p. 28). The three

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[3] The California Supreme Court denied review but ordered that the opinion of the court of appeal not be published in the official reports. 179 Cal. Rptr. at 520.

ranches were sold as a unit in October 1979, with petitioner retaining ownership of the harvestable redwood timber for a period sufficient to challenge the County's denial of a permit and to harvest, until mid-1982 (App. B, pp. 27-28). The value of the harvestable redwood at the time was approximately $1 million (*id.*).

Petitioner, after his timber rights had expired, brought this inverse condemnation action under 42 U.S.C. § 1983.[4] The district court found that subdivision and development of the property was foreclosed by the County (App. B, p. 20); that the property could not viably be operated as a cattle ranch or farming operation (App. B, pp. 19-20, 29); and that had petitioner been allowed to harvest redwood timber he could have met his "immediate operation and maintenance expenses, including taxes and insurance" (App. B, pp. 29-30). However, since timber harvesting could not also generate income sufficient to pay off petitioner's mortgage, the district court concluded that timbering was not an "economically viable use" and was therefore entitled to no protection against an uncompensated taking (App. B, p. 44).

The court of appeals affirmed. Although rejecting the district court's analysis, the court of appeals held that there had been no taking because the County had not interfered with "the two present and primary uses of the property"—that is, cattle grazing and a so-called "holding" for investment use (749 F.2d at 547; App. A, p. 10). In the face of the district court's finding that the cattle operations were not economically viable (App. B, pp. 19-20, 29), the court of appeals necessarily held that mere ownership of the property was an economically viable use (749 F.2d at 549 n.8; App. A, p. 14)—even though, as the district court found, petitioner suffered a loss when he was finally forced to sell the property.

REASONS FOR GRANTING CERTIORARI

This case presents an issue of recurring and great importance: namely, whether a state or local government, through a series of

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[4] See note 1 and accompanying text.

regulatory actions, can deprive an owner of private property of all gainful use of his property, and still avoid payment of any compensation under the Fifth Amendment. The guidance of this Court is needed to clarify widespread confusion in the lower courts which is substantially eroding the protection of the Just Compensation Clause.

In *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), relying on *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978), this Court held that the test for a regulatory taking is whether a property owner is denied the "economically viable use" of his land. More recently, in *Kirby Forest Industries, Inc. v. United States*, ____ U.S. ____, 104 S. Ct. 2187, 2196 (1984), the Court "recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land" may give rise to a taking.

Despite its central importance in the law of regulatory takings, the concept of "economically viable use" remains undefined, with the result that many courts deny *any* significant content to a basic constitutional safeguard. The opinion below, like many recent decisions, is premised on the notion that the value of property must be completely destroyed before the owner may recover compensation. This is contrary to the principles of fairness which should apply in Fifth Amendment taking cases, and conflicts with another line of lower court cases that permit recovery for temporary takings.

The instant action is *not* based on petitioner's frustrated hope of developing the ranches into a residential subdivision, on his failure to recover his investment in those ranches, or on his inability to put the property to its highest and best use. It is based on the fact that the County prevented petitioner from using the existing resources of his property to meet current, necessary expenses of ownership, not including acquisition costs,[5] and thereby forced him to operate at an actual out-of-pocket loss.

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[5] By "current" expenses we mean the costs of operation and maintenance, *without* any allowance for mortgage principal and interest. Thus, we agree that an owner's right to recover compensation should not depend on what he happened to pay for his property.

Petitioner seeks compensation for the denial of the *minimal* gainful use of his land—i.e., redwood timber harvesting. The taking claim in *Kirby* was rejected because "[t]he Government never forbade petitioner to cut the trees on the land or to develop the tract in some other way" (104 S. Ct. at 2196); the plaintiff in *Agins* lost because he was able to build one residence per acre (447 U.S. at 262). Here, by contrast, the County forbade both residential development *and* the only use of petitioner's existing resources that could have covered the minimum expenses of holding the property.

As a result, this case presents a question which goes to the very heart of the law of inverse condemnation: whether the right to an economically viable use of property,[6] like the rights to exclude others or to be free of a permanent physical intrusion by the government,[7] is fundamental to ownership and cannot be destroyed without compensation.

I. THE OPINION BELOW DISREGARDS, AND TYPIFIES THE TENDENCY OF LOWER COURTS TO DISREGARD, THE STANDARDS ESTABLISHED BY THIS COURT.

Neither the district court nor the court of appeals identified any allowable use of petitioner's property that was economically viable. The district court found that each possible use was either impermissible or uneconomic (App. B. pp. 19-21), so that petitioner was forced to hold the property at an actual loss (App. B, p. 28). The district court based its judgment in favor of the County on the theory that unless timber harvesting would have allowed petitioner to recoup his entire investment, including mortgage payments and interest, it was not sufficiently profitable to be "economically viable" and, therefore, was not susceptible to a claim of taking (App. B, pp. 43-44). The court of appeals

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[6] It may be assumed, for purposes of this case, that such a right is limited to owners whose property actually *has* a presently available, gainful use.

[7] *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-38 (1982).

correctly rejected this standard,[8] but that court also failed to identify any viable use of the property. Although its opinion stressed that petitioner was able "to continue to use the property for 'its original intended uses' " (749 F.2d at 548-49; App. A, p. 13)—i.e., cattle operations and "holding" for investment—the determination of the court of appeals cannot be reconciled with the fact that those historic "uses" had ceased to be economically viable, if they ever had been (App. B, pp. 19-20, 29-30).

To explain the importance that it attached to the property's "original intended uses," the court of appeals purported to rely on *Penn Central* (749 F.2d at 548-49; App. A, pp. 12-13) (*see infra,* note 11). Yet *Penn Central,* in the very footnote cited by the court below, made clear that the economic viability of a property's present use, and not the continued availability of its historic use, determines the existence of a taking:

> "We emphasize that our holding today is on the present record, which in turn is based on Penn Central's *present ability* to use the Terminal for its intended purposes *and in a gainful fashion.* The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable,' appellants may obtain relief." 438 U.S. at 138 n.36 (emphasis added).

The court of appeals' evident conclusion that the mere ownership of property is an economically viable "use" (749 F.2d at 547 n.7; App. A, pp. 10-11) would sanction the most overbearing zoning and land use regulations. Any regulation which stops short of actually divesting the property owner of title would allow "holding property for investment" (*id.*), and would therefore pass

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[8] Not only was the district court's analysis "a major departure from the prior jurisprudence in this area" (749 F.2d at 548; App. A, p. 12), but it ignored that petitioner's plans for residential subdivision would have generated "sufficient capital to enable him to make the mortgage payments on the ranches" (App. B, p. 20). Thus, the district court's reasoning simply leads to the conclusion that petitioner suffered a taking, not when his timber harvest plan was denied, but when his subdivision plan was rejected.

constitutional muster under the Ninth Circuit's test. The logical import of a rule that holding property is a use, and is economically viable without regard to costs, is that a taking cannot occur at least until property has lost all value and become unmarketable. This position has been made explicit in recent decisions of the Second Circuit,[9] and seems to underlie several other decisions.[10] Although the Fifth Amendment may tolerate extensive regulation of private property, we submit that such a rule removes any effective limitation on regulation and constitutes an evasion of the Fifth Amendment.

The Ninth Circuit's conclusion that mere ownership of property is an economically viable use conflicts with *Penn Central.* There, it was of critical importance that the "*present* uses" of the property were sufficient to provide the owner with some gain. 438 U.S. at 136 and 138 n.36 (emphasis added).[11] Here, petitioner was forced to "hold" his property without any income to cover operating expenses. To equate this state of affairs with economic "viability" is to rob that concept of any real meaning.

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[9] *Sadowsky v. City of New York,* 732 F.2d 312, 318 n.3 (2d Cir. 1984); *see also Pompa Constr. Corp. v. City of Saratoga Springs,* 706 F.2d 418, 424-25 (2d Cir. 1983).

[10] *Ortega Cabrera v. Municipality of Bayamon,* 562 F.2d 91, 100 (1st Cir. 1977) (suggesting that "takings exist only when the diminution in values amounts to the total destruction of the value of an identifiable thing . . . perceived by a reasonable owner as the subject of a distinct investment"); *Maher v. City of New Orleans,* 516 F.2d 1051, 1066 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976) (judgment for defendant affirmed where the challenged ordinance did not "leave Maher, in effect, nothing").

[11] Rather than come to grips with this language from *Penn Central,* the court of appeals simply misquoted it. Thus, the opinion below states that *Penn Central* linked the concept of economic viability "to 'the ability to use the property *for its intended purpose* in a gainful fashion.' " 749 F.2d at 548 (App. A, p. 12), citing 438 U.S. at 138, n.36; emphasis in original. In fact, the cited footnote refers to "Penn Central's *present ability* to use the Terminal for its intended purposes *and* in a gainful fashion" (emphasis added). This error was called to the attention of the court of appeals in the petition for rehearing, but was not corrected.

Finally, the decisions below typify the tendency of lower courts[12] to dispense with "careful assessment of the impact of the regulation," as mandated by *Penn Central* (438 U.S. at 136), and instead to observe simply that: (1) there is no fixed standard for a regulatory taking, but (2) municipalities have broad discretion to regulate land use, and (3) the plaintiff cannot prevail because he is not in as desperate straits as the plaintiffs in cases like *Euclid v. Ambler Co.*, 272 U.S. 365 (1926) or *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).[13] The absence of clear and adequate standards has not only confused the lower courts[14] but has led them increasingly to abandon the defense of private property.

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[12] *Pompa Constr. Corp. v. City of Saratoga Springs*, 706 F.2d 418, 424-25 (2d Cir. 1983); *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 99-101 (1st Cir. 1977); *Maher v. City of New Orleans*, 516 F.2d 1051, 1065-66 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *see also Dirt, Inc. v. Mobile County Com'n*, 739 F.2d 1562, 1565-66 (11th Cir. 1984).

[13] In *Euclid* and *Hadacheck*, the plaintiffs sought to translate a huge reduction in the market value of their properties, stemming from a prohibition of the properties' most profitable use, into a compensable taking. *See Euclid*, 272 U.S. at 384 (75% reduction); *Hadacheck*, 239 U.S. at 405 (90% reduction). The courts below, like many others, reasoned that because the whole of petitioner's investment in his property was not destroyed, he did not suffer a taking (App. A, p.11; App. B, p. 45). Such logic ignores the fact that the property owners in *Euclid* and *Hadacheck* retained what petitioner here did not: a *use* of their property that was economically gainful. *See Euclid*, 272 U.S. at 380, 382 (two-family dwellings); *Hadacheck*, 239 U.S. at 408 (mining for clay).

[14] Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv.L.Rev. 1165, 1169-70 (1967).

II. THE ALLOWABLE USES OF PROPERTY, AND NOT THE POSSIBILITY THAT OTHER USES MAY BE PERMITTED IN THE FUTURE, SHOULD DETERMINE WHETHER THERE HAS BEEN A TAKING.

It is settled that mere diminution in the value of property does not establish a taking, and that an owner is not entitled to the most gainful use of his property. *Penn Central*, 438 U.S. at 131; *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962). But it does not follow that the complete destruction of value (or marketability) is necessary to establish a taking. Rather, "the 'taking' issue in these contexts is resolved *by focusing on the uses the regulations permit.*" *Penn Central*, 438 U.S. at 131 (emphasis added). There are compelling reasons that land use regulation should be tested, for purposes of the Fifth Amendment, by its impact on the availability of some gainful use of private property, rather than by its impact on the value of such property.

1. The premise of permitting recovery for a temporary taking[15] is that the denial of present use will support a taking claim. That is, even though the restrictive regulation may ultimately be invalidated or otherwise terminate, these cases suggest that the Fifth Amendment requires compensation for the intervening denial of *use*. No less should compensation be required where government action requires an owner to forego the gainful use of his property. Simply because the property can still attract a buyer with the ability to wait for a change in economic or political conditions affords insufficient excuse to deprive the owner of what ought to be a "fundamental element of the property right" (*Kaiser Aetna*, 444 U.S. at 179-80): the economically viable use of property.

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[15] *See, e.g., San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 657-58 (1981) (Brennan, J., dissenting); *Hamilton Bank v. Williamson Cty. Reg. Planning Comm.*, 729 F.2d 402, 407 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3202 (U.S., Oct. 1, 1984) (No. 84-4); *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 888 (Fed. Cir. 1983); *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 996-97 (1st Cir. 1983).

2. This Court has recognized that " '[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title.' " *Kaiser Aetna v. United States,* 444 U.S. 164, 174 n.8 (1979), quoting *Chicago, R. I. & P. Ry. Co. v. United States,* 284 U.S. 80, 96 (1931). The gainful use of property is as fundamental to ownership as the right to limit public access to one's property or to be free of physical intrusion by the government,[16] and should be protected no less by the Just Compensation Clause. This protection is essential to reflect the true character of the property right:

> "Property does not have rights. People have rights. . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972).

To limit the owner of the several thousand acres involved here from attempting even a minimally gainful economic activity on property of this scale "goes too far" in restricting the owner's freedom with relation to the physical thing (*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)).

3. As this Court has repeatedly explained, taking claims require a balancing of public and private interests to determine when "the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins,* 447 U.S. at 260-261. Where a property owner is allowed some gainful use while the public benefits from a ban on other uses, such a balance may in some sense be achieved. But if market value were the criterion for a taking, courts would be, and apparently have been, unable to find a stopping point short of the conclusion that property is not taken until its value is totally destroyed.[17] Such an arbitrary rule makes no pretense of rationally adjusting the competing public and private interests. The public

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[16] *Kaiser Aetna v. United States,* 444 U.S. 164, 179-80 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435-38 (1982).

[17] Compare *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) (Holmes, J.):

would pay nothing during what may be a prolonged period of loss by the private property owner.

4. The court of appeals' conclusion that allowing an owner the historic use of his property is a constitutionally adequate substitute for economic viability ignores the impact of changing circumstances. The fact that petitioner's predecessor did not use the ranches for economic gain (App. B, p. 17) should not preclude petitioner from seeking to realize some economic benefit from this substantial, if historically underutilized, parcel of land. To confine an owner to land uses simply because they are historic takes from him the ability to respond to actual, and inevitably changing, conditions. If the community imposes such a limitation upon an owner of property it has deprived him of essential rights denoted by the concept of property.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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"When this seemingly absolute protection [of the Fifth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 83-2480

D.C. No. C-82-3751-RFP

Morton P. MacLeod,
Plaintiff-Appellant,

vs.

County of Santa Clara,
Defendant-Appellee.

[Filed Dec. 10, 1984]

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding
Argued and submitted October 2, 1984

OPINION

Before: FARRIS, ALARCON, and NORRIS, Circuit Judges.
ALARCON, Circuit Judge:

Morton P. MacLeod (hereinafter MacLeod) appeals from the judgment in favor of Santa Clara County (hereinafter the County) holding that the County's denial of his application for a permit to harvest timber on his property did not constitute a compensable taking. MacLeod contends that the district court erred in holding that the denial of a permit to harvest timber did not effect a "taking" of his property for a public use, within the meaning of the fifth amendment, requiring just compensation.[1]

[1] The fifth amendment is made applicable to the States through the fourteenth amendment, *see Chicago, B. & O. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). We note jurisdiction under 28 U.S.C. § 1291 (1983).

FACTS

Appellant MacLeod is the successor in interest to, and the former president and director of, the Castro-Escondido Ranch Corporation (hereinafter the Ranch Corporation). In June of 1974, while MacLeod was serving as its president, Triad Capital Management Holding Company (hereinafter Triad) formed the Ranch Corporation for the purpose of purchasing and holding title to the Castro-Valley and Escondido Ranches. MacLeod was responsible for the purchase of the property, which was offered for sale as a single parcel consisting of approximately 7,000 acres.

The Escondido Ranch, which contains about 1,800 acres, is primarily a mountainous woodland. The Castro-Valley Ranch, which contains about 5,200 acres, is primarily covered by a mountain range and woodland, with many sections of open grazing land. An enclosed valley of approximately 150 acres of relatively flat land, known as the Castro-Valley, gives that ranch its name. The entire property is located within the A1 Residential and Agricultural zoning district of Santa Clara County. MacLeod, anticipating a significant increase in value, purchased the property on behalf of the Ranch Corporation for $2,700,000 as a long-term investment, with interim use as a cattle ranch.

In December of 1976, MacLeod's association with Triad was involuntarily terminated. On January 1, 1977, in exchange for his stock in the parent company and other consideration, MacLeod received 100% of the Ranch Corporation's stock.[2] MacLeod's stock in Triad was deemed to be worth the sum of the down payment on the property ($800,000) and the two-year carrying costs ($640,000). Thus, MacLeod's "investment" in the Castro-Escondido property was $1,400,000. He assumed the outstanding mortgage of $1,700,000.[3]

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[2] MacLeod received the Ranch Corporation stock rather than cash or some other asset because Triad determined that MacLeod should be the one to "live with" his investment decision.

[3] In early 1978, the name of the Ranch Corporation was changed to the Bloomfield-Hereford Corporation because MacLeod, on behalf of

MacLeod continued the historic use of the property, by leasing it out in its entirety for cattle grazing during the first years of ownership. In 1977, MacLeod purchased approximately 150 cow-calf units in an effort to run his own cattle operation on the Castro-Escondido property. In 1978 and 1979, MacLeod again leased out the entire property for cattle grazing. Neither activity proved sufficient to cover the costs of maintaining the property. In October of 1977, MacLeod obtained a permit from the County to harvest hardwood. The harvest was conducted in 1978-1979, but proved unprofitable as well. In 1978, MacLeod attempted an experimental farming operation on the 150 acre valley in the Castro-Valley parcel. Water problems led to the abandonment of this project. MacLeod then began to pursue the possibility of large-scale timber harvesting.

MacLeod employed the firm of Hammon, Jensen, Wallen, and Associates, professional foresters, to prepare an inventory of the property and a timber harvest plan (hereinafter the Plan). The resulting plan involved the selective harvesting of a maximum of 2.5 million board feet of timber. Pursuant to the California Z'berg-Nejedly Forest Practice Act of 1973, Cal. Pub. Res. Code § 4511 *et seq.*, MacLeod submitted this Plan to the State Department of Forestry. After inspecting the property, the State Department of Forestry approved the Plan.

MacLeod subsequently entered into an agreement with Big Creek Lumber Company (hereinafter Big Creek) whereby MacLeod agreed to sell, and Big Creek agreed to harvest, 2.5 million

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the Ranch Corporation, purchased the Bloomfield-Hereford Ranch, which was contiguous to the Castro-Escondido property. The district court found that because the Bloomfield Ranch was acquired separately, zoned differently, and had an overall topography different from that of the Castro-Escondido Ranch, MacLeod's ownership of the Bloomfield Ranch would be considered somewhat a "fortuity," and, for purposes of the taking analysis, only the Castro Valley and Escondido ranches would constitute the property at issue. Since MacLeod does not challenge this particular finding, we need not address it here. But hereafter, all references to the ranch property refer to the Castro-Escondido property only unless otherwise noted.

board feet of redwood timber. Under the terms of the contract, MacLeod was to receive a fixed price of $325 per thousand board feet of redwood timber.

The timber sale agreement was conditioned on the obtaining of a use permit from the County that was satisfactory to Big Creek. MacLeod applied for a permit in September of 1978. The planning commission conducted a hearing on MacLeod's application in September of 1979. The application was denied for public health, safety, and welfare reasons.

MacLeod appealed the denial to the County Board of Supervisors. That body held a de novo hearing on the application. The denial of the permit was upheld. MacLeod then filed a complaint in the Superior Court in California seeking to set aside the determination of the Board. The Santa Clara County Superior Court entered judgment for the County. MacLeod then sought expedited review before a California appellate court by writ of mandate.[4] In an opinion issued December 29, 1981, the California Court of Appeal denied the writ, effectively affirming the judgment. MacLeod's petition for a hearing in the California Supreme Court was denied on March 11, 1982.

Shortly thereafter, MacLeod filed this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983 seeking compensation for the alleged "taking" of his property by the County in violation of the fifth and fourteenth amendments. After a trial, the district court entered judgment for the County. The district court found that although MacLeod had a right to an economically viable use of his property, such use did not exist. The court held that the property in question would not have been sufficiently profitable, even if the permit to harvest timber had been granted, for the denial of the permit to constitute a taking.

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[4] In the meantime, MacLeod sold the ranches. The Bloomfield-Hereford Ranch Corporation entered into an agreement to sell the entire property to the C.M. Trading Company for $7,201,524. The Bloomfield-Hereford Ranch Corporation was dissolved in April of 1980, but MacLeod personally assumed its assets and liabilities.

We do not agree with the district court's reliance on immediate overall profitability as the standard for determining whether a compensable taking has occurred. We agree, however, that no taking has occurred on the facts of this case, and affirm the judgment for the reasons stated below.

DISCUSSION

I

The fifth amendment guarantees that private property shall not "be taken for public use, without just compensation." Traditionally, a compensable "taking" was deemed to occur whenever a government agency or entity formally condemned a landowner's property and obtained the fee simple pursuant to eminent domain proceedings. *Cf. United States v. Clarke*, 445 U.S. 253 (1980) (distinguishing traditional condemnation and eminent domain proceedings from modern takings); *Andrus v. Allard*, 444 U.S. 51 (1979) (comparing the two methods of taking—compelling surrender or physical invasion vs. restriction of use or rights in private property); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Under present law, a taking can also occur, without the filing of condemnation proceedings, whenever government action beneficial to the public results in the destruction or restriction of the use and general enjoyment of privately owned real property. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 178-180 (1979) (navigational servitude allowing public right of access); *United States v. Causby*, 328 U.S. 256, 261-62 (1946) (frequent low altitude flights of Army and Navy aircraft over a chicken farm). The rationale for expanding the traditional notion of "taking" is relatively simple: "Police power regulations such as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J. dissenting).[5]

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[5] The cause of action alleged in such an instance is inverse condemnation. The term "inverse condemnation" simply refers to "a cause of

Although it is now well established that government regulations *can* effect a fifth amendment taking, *see, e.g., Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) (no taking found on the facts of the case); *In re Aircrash in Bali Indonesia on April 22, 1974,* 684 F.2d 1301, 1312 (9th Cir. 1982), we cannot agree with MacLeod's contention that the denial of the permit operated to effect a taking of property in this instance. No set formula has been developed for determining when "justice and fairness" require that economic injuries caused by government regulations for the good of the general public must be compensated by the government rather than left to remain disproportionately concentrated on a few individuals. *See, e.g., Andrus, supra* at 65. Instead, the question of whether or not a particular restriction effects a taking depends largely upon the particular circumstances of the case. *See Penn Central, supra* at 124. The law is well settled, however, that the application of a general zoning law to particular property effects a taking if "the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . . " *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980), *citing Penn Central, supra.* If a regulation or prohibition is a valid exercise of the police power, there is no taking if economically viable use of the property remains.

II

The phrase "economically viable use" became an important part of taking jurisprudence after the Supreme Court decision in *Penn Central, supra. Penn Central* involved the application of New York City's Landmark Preservation Law to Grand Central Terminal (hereinafter the Terminal). The Terminal, owned by

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action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Clarke, supra* at 257. An action for inverse condemnation is cognizable under 42 U.S.C. § 1983. *See Lake Country Estates v. Tahoe Planning Agency,* 440 U.S. 391, 398-400 (1979).

Penn Central Transportation Company and its affiliates (hereinafter Penn Central), is one of New York City's most famous buildings, and as such, had been designated a landmark.

To increase its income, Penn Central entered into a renewable 50-year lease and sublease agreement with UGP Properties, Inc. (hereinafter UGP). Under the terms of the agreement, UGP was to construct a multi-story office building above the Terminal. UGP and Penn Central then applied to the Landmarks Preservation Commission (hereinafter the Commission) for permission to construct the proposed office building atop the Terminal. Permission was denied on the ground that the proposed tower would overwhelm the existing building, destroy its aesthetic appeal, and reduce the designated landmark to the status of a curiosity. *Id.* at 118.

Rather than seek review of the denial of the certificate of construction, appellants filed suit in New York State Court claiming that the application of the Landmark Law had "taken" their property without just compensation in violation of the fifth amendment, and arbitrarily deprived them of their property without due process of law in violation of the fourteenth amendment. The New York Court of Appeals summarily rejected any claim that the Landmark Law had taken appellant's property without just compensation.

In affirming the New York Court of Appeals, the Supreme Court used a two-step analysis, deciding first whether the Landmark Law was constitutional, and second, whether it so interfered with appellant's property as to require compensation. In deciding that the law was a constitutional exercise of the police power, the Court noted that use prohibitions or restrictions are unconstitutional takings if the government action in issue cannot be characterized as an acquisition of resources to permit or facilitate uniquely public functions, *see United States v. Causby*, 328 U.S. 256 (1946), if the regulation in issue is not reasonably necessary to effectuate a substantial public purpose, or if the government regulation or action so frustrates the distinct investment-backed expectations of the claimant as to have nearly the same effect as the complete destruction of the claimant's rights,

see Armstrong v. United States, 364 U.S. 40 (1960) (government's complete destruction of a materialmen's lien in certain property held a "taking"); *Pennsylvania Coal Co. v. Mahon, supra. Penn Central, supra* at 127-28. The Court quickly disposed of Penn Central's contentions that the law amounted to discriminatory zoning, or was arbitrary because it was basically a matter of taste. *Id.* at 132. It rejected the argument that the law unfairly distributed the benefits and burdens of governmental action by not imposing identical restrictions on all structures located within a particular community, holding that the imbalanced distribution of the benefits and burdens resulting from such an ordinance did not mean that the law effected a taking. *Id.* at 133. It also held that the fact that a regulation had the effect of denying the owner the ability to exploit a property right that was heretofore believed available, or diminishing the value of the property did not prove that such regulation amounted to a taking. *Id.* at 130-31. Finally, the Court rejected Penn Central's challenge to the law's constitutionality by holding that the law had not operated to appropriate part of the property for strictly governmental purposes. *Id.* at 135. Thus, it held that although the New York City Landmark Law restricted the exploitation of a property interest to a greater extent than applicable general zoning law, it was not unconstitutional. *Id.* at 135-36.

The Court then went on to consider the severity of the impact of the law on Penn Central's property. After a careful assessment of the impact of the regulation on the terminal site, the Court found that the Landmark Law did not interfere in any way with the present uses of the terminal:

> Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal .... So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.

Id. at 136. The Court also found that the law permitted Penn [Central] to obtain a "reasonable return" on its investment. *Id.* at 136. The Court concluded that the law permitted a "reasonable

beneficial use" of the landmark site, and thus held that it had not effected a taking of Penn [Central]'s property. *Id.* at 138.[6]

III

MacLeod contends that the denial of the permit operated to deny him economically viable use of his property. We cannot agree. The issue of whether the denial of the permit was a legitimate exercise of the County's police power was decided by the California State Courts in favor of the County. MacLeod has not pursued that question before this court. Therefore, our review is limited to the issue of whether the rejection of the application denied MacLeod the economically viable use of his property.

Any analysis of whether a regulation or prohibition denied an owner the economically viable use of his property necessitates a review of the impact of the regulation or prohibition on the property as a whole. *See Penn Central, supra* at 130. In *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962), appellant challenged a city ordinance that completely prohibited a beneficial use to which the property had previously been devoted by prohibiting further excavation on 20 acres of their 38 acre lot. In holding that the ordinance was a valid exercise of the police power, the Court took into consideration the availability of the remaining 18 acres of land in determining that the ordinance was neither so onerous or unreasonable as to result in a taking of appellant's property. *Id.* In *Gorieb v. Fox,* 274 U.S. 603 (1927), the challenged ordinance created a setback or building line to which all buildings subsequently erected had to conform. The appellant owned several building lots within the area covered by the ordinance. He applied to the city council for a permit to erect a brick building upon a lot within the ordinance area, and the council gave him permission to erect a building 34⅔ feet back from the street line. He thereupon sought to compel the council to issue a permit to occupy the lot up to the street line, alleging that the setback ordinance deprived him of his property without due process of law. The Court

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[6] The Court refers to the importance of this economically viable use in footnote 36 on this same page.

sustained the setback ordinance as reasonable and constitutional, holding that the restriction was not so substantial as to amount to a taking of appellant's property.

Thus, it is well settled that taking jurisprudence does not divide a single parcel into discrete segments or attempt to determine whether rights in a particular segment of a larger parcel have been entirely abrogated. The Supreme Court has long since rejected any contention that denial of the use of a portion of a parcel of property is so bound up with the investment-backed expectations of a claimant that government deprivation of the right to use a portion of the property in issue invariably constitutes a taking, irrespective of the impact of the restriction on the value of the parcel as a whole. *Penn Central, supra* at 130, n.27. In deciding whether a particular governmental action has effected a taking, the Court must focus both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole. *Id.* at 130-31.

The denial of the permit, unlike the government acts in *Causby, supra,* did not interfere in any way with the two present and primary uses of the property. Specifically, the denial of the permit did not affect MacLeod's ability to continue to hold the property for investment purposes, with interim use as a cattle ranch, and grazing land, the very uses for which the property was purchased. It is an undisputed fact that MacLeod was free to continue to raise cattle or to lease out the property for grazing lands, and retained the right to continue to hold the property as an investment.[7] Thus, it is clear that the denial of the permit did not

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[7] Holding property for investment purposes can be a "use" of property. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (a suit brought by an owner of unimproved land that was vacant and had been held for years for the purpose of sale and development for industrial use, seeking relief from the enforcement of a zoning ordinance on the grounds that the ordinance operated to reduce the normal value of his property, and to deprive him of liberty and property without due process of law. The ordinance was held to be a valid exercise of the police power. The validity of the owner's "uses" was never questioned); *United States v. 156.81 Acres of Land*, 671 F.2d 336, 337 (1982), *cert.*

interfere with MacLeod's primary "investment-backed expectation" concerning the use of the parcel. *See Penn Central, supra* at 136.

MacLeod would have us disregard the fact that the denial of the permit did not affect his expected uses of the Ranch property because he eventually found out that these uses were not the most profitable or the highest and best use of the property. It is undeniable that rejection of the permit kept MacLeod from pursuing what may have been the most profitable short term use of the property, i.e., large scale timber harvesting. The fact that the denial of the permit prevented MacLeod from pursuing the highest and best use of his property does not mean that it constituted a taking.

In addition, appellant's "highest and best use" argument is simply another way of claiming that he has suffered a diminution in the value of his property rather than the complete destruction of its economically viable use. The Supreme Court has repeatedly held that mere diminution in value, standing alone, cannot establish a taking. *See Penn Central, supra* at 131; *Euclid, supra* (75% diminution in value); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915) (value reduced from $800,000 to $60,000). *See also William C. Haas & Co. v. City & County of San Francisco,* 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1980) (value reduced from $2,000,000 to $100,000).

Moreover, the timber sale agreement with Big Creek was contingent upon MacLeod obtaining all necessary permits. Although at the time MacLeod applied for the permit he had every reason to believe that his application would be granted, he must have been aware that the standards and conditions governing the issuance of the permit might cause his application to be denied.

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denied, 459 U.S. 1086 (1982) (where appellants owned roughly 156.81 acres of undeveloped land in Marin County, California which was undisputedly not income producing, but had been purchased and was being held for its "development potential." A condemnation judgment which denied the economically viable use of the property was nevertheless held to be a taking requiring just compensation).

Thus, MacLeod had an expectation, but not an assurance that the permit would issue. In essence, MacLeod is contending that there has been a taking requiring compensation because he has been denied the opportunity to exploit his property by pursuing a particular project he had come to believe would be available for development. This argument fails. In *Penn Central, supra*, the Supreme Court rejected as "quite simply untenable" the contention that property owners "may establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development . . . ." *Id.* at 130.

MacLeod finally argues that the district court erred in holding that the denial of the permit was not a taking because the timber harvesting operation would not have produced a profit over and above the overall expenses of the entire ranch operation. He asserts that the standard to be applied in the determination of "economic viability" does not depend on the overall profitability (ability to generate income sufficient to cover expenses and carrying costs), of the property or business in issue. We agree. Although the Supreme Court has never elaborated on the meaning of "economically viable," *Penn Central, supra* linked its use of the term to "the ability to use the property *for its intended purpose* in a gainful fashion." *Id.* at 138, n.36 (emphasis added). Further, the Supreme Court has stated with respect to a "lost future profits" based taking claim, that: "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus v. Allard, supra* at 66.

We are unwilling to equate immediate overall profitability with the requirement of "economic viability." To do so would be a major departure from the prior jurisprudence in this area. We perceive nothing in the language of *Agins, supra,* or *Penn Central, supra,* that would in any way cast doubt on our analysis. It was thus error for the district court to consider the immediate overall profitability as the measure of whether or not there had been a

taking of appellant MacLeod's ranch property. This error was neither dispositive nor prejudicial, however, in light of MacLeod's inability to prove that the denial of the permit had indeed operated to effect a taking of his property. It is clear from the record that the denial of the permit in no way affected MacLeod's ability to continue to use the property for "its original intended uses." *See Penn Central, supra* at 138, n.36. His assertion that the denial of the permit effectively extinguished an expected opportunity for exploitation of his property, thereby preventing him from pursuing the highest and best use of his property, is not enough to establish a taking. *See Penn Central, supra.*

CONCLUSION

In sum, existing authority compels us to reject MacLeod's contention that the denial of the right to use a portion of a parcel of property invariably constitutes a taking, irrespective [of] diminution of value, or denial of the highest and best use of property can constitute a taking have each been rejected by the Supreme Court. The determination of whether or not an economically viable use of property remains is essentially an ad hoc factual inquiry. *Penn Central, supra* at 124. That decision turns upon the economic impact of the regulation and, particularly, the extent to which the regulation or prohibition has interfered with the distinct investment-backed expectations of the claimant. *Id.* The denial of the permit to harvest timber merely prohibited an additional expected use of the property. This is not enough to allow us to conclude that it interfered with MacLeod's investment-backed expectations, extinguished a fundamental attribute of ownership, or prevented MacLeod from deriving a reasonable return on the property.

We are not insensitive to the fact that the denial of the permit may have placed MacLeod in a difficult short term financial situation. But the fifth amendment is not a panacea for less-than-perfect investment or business opportunities. It cannot be said that the denial of the permit denied MacLeod the " 'justice and

fairness' guaranteed by the Fifth . . . Amendment . . . ." *Agins, supra.* We therefore conclude that no taking occurred.[8]

Accordingly, the opinion of the district court is AFFIRMED.

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[8] We are aware of the recent Sixth Circuit decision in *Hamilton Bank of Johnson City v. Williamson County*, No. 82-5388 (6th Cir. March 7, 1984). The Supreme Court has recently granted certiorari in that case. We do not find *Hamilton Bank* dispositive of the question before us. The *Hamilton Bank* Court held that the evidence supported a finding that the property in question had *no* remaining economically viable use after the zoning ordinance was instituted. This was not the case with MacLeod's ranch property. Further to the extent that the *Hamilton Bank* Court relies on the notion that diminution in value is a significant interference with investment-backed expectations amounting to a taking, *id.* at p.10, it is contrary to the law of this circuit. *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

Appendix B

In the United States District Court

For the Northern District of California

No. C-82-3751 RFP

Morton P. MacLeod,
Plaintiff,
v.
County of Santa Clara,
Defendant.

JUDGMENT
[Filed Sept. 15, 1983]

This matter having come before the court, the Honorable Robert F. Peckham, Chief Judge, presiding, and the issues having been presented, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that judgment be formally entered in favor of defendant.

Dated: September 15, 1983

/s/ Robert F. Peckham
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 82-3751 RFP

Morton P. MacLeod,
Plaintiff,
v.
County of Santa Clara,
Defendant.

MEMORANDUM AND ORDER

[Filed Sept. 15, 1983]

I.

INTRODUCTION

Plaintiff Morton P. MacLeod brings this action under 42 U.S.C. § 1983, seeking relief for an alleged denial of rights guaranteed by the fifth and fourteenth amendments of the United States Constitution. Defendant County of Santa Clara is a legal subdivision of the state of California; the Board of Supervisors is its governing body. The Board enacts and administers provisions of the county Code. Plaintiff alleges that the Board of Supervisors' failure to grant him a use permit to harvest timber on his land effected a taking of his property without just compensation. Jurisdiction over this action is founded upon 28 U.S.C. §§ 1331 and 1343. For the reasons stated below, we conclude that plaintiff cannot prevail upon his asserted claim.

II.

FINDINGS OF FACT

In June of 1974, while plaintiff Morton P. MacLeod was serving as its president, Triad Capital Management Holding formed the Castro-Escondido Ranch Corporation (Ranch Corporation), for the purpose of purchasing and holding title to the Castro Valley Ranch and the Escondido Ranch. At the time of this purchase, plaintiff owned 15% of the stock in Triad and served also as president and director of the Ranch Corporation.

Plaintiff was responsible for the purchase of the property, which was being offered for sale as a single, approximately 7,000 acre parcel by the estate of Harold Chase of Santa Barbara.

Plaintiff, on behalf of the corporation, purchased the property for $2,700,000 for the general purpose of long-term investment, anticipating a significant increase in its value. The Escondido Ranch, which contains about 1800 acres, is mountainous woodland. The Castro Valley Ranch, which contains about 5200 acres, is mostly mountainous range and woodland with some parts characterized by rolling and open grazing land. An enclosed intermountain valley of approximately 150 acres of relatively flat land, known as Castro Valley, gives that ranch its name. The entire property is located within the "A1 Residential and Agricultural" zoning district of the County of Santa Clara. It is located south of Hecker Pass Highway and West of Monterey Highway in the County of Santa Clara.

Mr. Chase had utilized the property for cattle grazing (and polo playing) during the previous forty years of his ownership, and the Ranch Corporation purchased the property primarily as a cattle ranch. The Corporation retained Mr. Chase's foreman of forty years, Mr. Sxheigza, who provided information concerning the carrying capacity and other characteristics of the land. According to Mr. Sxheigza, and as confirmed by a report from the United States Department of Agriculture, *see* Plaintiff's Exh. 28 at 4, the entire property had been capable historically of sustaining about 250 head of cattle.

Plaintiff had had significant exposure to the cattle-raising industry. From 1972-1975, he had served on the Board of Directors of the Arizona Land & Cattle Company, one of the largest public cattle companies in America; at the request of President Sadat, he had worked on a large project in Egypt in connection with a dairy operation; and for President Numeiry of Sudan, he had been very instrumental in putting together a million-acre cattle ranch for the Sudanese and Nile. Hence, he was generally familiar with cattle ranching and its attendant expenses.

The Ranch Corporation continued the historical use of the property, leasing it out in its entirety for cattle grazing at $6/acre during the first two years of its ownership. Plaintiff, for the corporation, did not undertake an inventory of the timber potential prior to the purchase of the property, nor did he purchase the land with the distinct intention of exploiting the timber resources thereon, although before April 12, 1976, Santa Clara County had no ordinance or other restriction, limitation or regulation imposing a use permit requirement on proposed timber harvesting operations. The Ranch Corporation considered, but declined, to place the property under the California Williamson Act, Cal. Govt. Code §§ 51200 *et seq.*, which would have reduced the immediate property tax burden, but which also would have limited the potential of the land for subsequent development.

In December of 1976, plaintiff's association with Triad was involuntarily terminated. On January 1, 1977, in exchange for his stock in the parent company and other consideration, plaintiff received 100 percent of Ranch Corporation's stock. Plaintiff's stock in Triad was deemed to be worth the sum of the down payment on the property ($800,000) and the two-year carrying costs ($640,000). Thus plaintiff's "investment" in the Castro Valley-Escondido property was $1,400,000. He assumed the outstanding mortgage of $1,700,000. Plaintiff received the Ranch Corporation stock rather than cash or some other asset because Triad determined that plaintiff should be the one to "live with" his investment decision.

In November of 1977, the Ranch Corporation, by plaintiff, purchased the Bloomfield Hereford Ranch which was contiguous to the Castro-Escondido Ranch and also acquired options on two parcels adjacent to the Bloomfield Ranch, referred to as the Mondali and Floriani option parcels. The purchase price was $2,260,000. Plaintiff made a $500,000 down payment and obtained a 10-year mortgage for the remainder at 8% interest. In January or February of 1978, the name of Castro-Escondido Ranch Corporation was changed to Bloomfield Hereford Corporation.

The Bloomfield Ranch, which contains about 1300 acres, is gently rolling and mostly open grazing land along the western side of the Santa Clara Valley and was zoned "A Exclusively Agricultural." It is separated from the Castro Valley Ranch by a range of Santa Cruz Mountain foothills known as the Carlyle Hills. Unlike the Castro Valley and Escondido ranches, which fall entirely within the wildland classification used at the University of California for land and resource economics, the Bloomfield lands are transitional between wildlands and croplands. The property had been placed under the Williamson Act, although there was a clause therein which permitted a certain amount of subdivision. Plaintiff testified that he purchased Bloomfield in order to obtain better access to the Castro Valley-Escondido property and to generate income to enable him to satisfy his mortgage obligations on the latter property.

In December of 1976, when plaintiff accepted his Triad distribution in the form of 100% ownership of Ranch Corporation stock, he intended generally to investigate more actively the "potential" of the ranch, still emphasizing, however, its use as a cattle ranch.[1] In 1977, plaintiff purchased approximately 150 cow-calf units in an effort to run his own cattle operation on the Castro Valley-Escondido property. From this endeavor, plaintiff derived approximately $48,000 in gross income. However, the minimum cost of maintaining such an operation was $76,500 (with property taxes assessed under the Williamson Act) and, in fact, due in large part to the actual $75,000 yearly tax liability on the property, was considerably more. Although all three ranches together could have sustained 400 cow-calf units, the increased revenue would still not have compensated for the costs of operation, including property taxes, and most certainly could not have carried the mortgage payments.

In 1978 and 1979, plaintiff leased the entire property for cattle grazing at $8/acre. This, too, did not prove sufficient to cover the

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[1] Although he considered harvesting redwood timber when he obtained ownership of the corporate stock, he did not know the true market value of the timber at that time.

costs of maintenance and retention of the property. The taxes alone exceeded the lease revenues from all three ranches.

In October of 1977, plaintiff obtained a permit from the County to harvest hardwood. The harvest was conducted in 1978-1979 but proved to be unprofitable. Such a harvest could not be repeated within the next forty years.

Plaintiff expended substantial funds in an effort to identify water resources for the ranch. In 1978, he had attempted an experimental farming operation on the 150 acre valley in the Castro Valley parcel. He planted 14 acres with cucumbers, corn and string beans, and pumped two wells completely dry in an effort to irrigate the plants. Thereafter, he spent in excess of $100,000 attempting to locate a well which would provide the necessary 600 gallons/minute but was unsuccessful. He had filed an application with the State Water Resources Board for a permit to construct a large dam in the valley at a probable cost of $500,000, but sold the property before obtaining such permit.

Finally, plaintiff attempted to develop the Bloomfield Ranch. By subdividing the ranch and selling the parcels, plaintiff hoped to be able to generate sufficient capital to enable him to make the mortgage payments on the ranches. He presented a subdivision plan to the County, involving a farm-residence complex of 24 parcels, each on 43 acres. The Board of Supervisors rejected the plan on the grounds that such a subdivision would require the extension of urban services such as police, fire, road maintenance, animal control and schools, and the Bloomfield Ranch was beyond the County's Urban Service Areas. Since the Castro Valley-Escondido property is even more remotely located, any effort by the plaintiff to develop that land for residences would likely have been doomed to similar failure. Hence, residential development was also not a viable use of that property during the relevant time period 1974-1982.

Plaintiff testified that, between 1974 and 1980, the cattle market suffered a depression, and the Castro Valley-Escondido property (as well as the Bloomfield) could not, if indeed it ever *could* have been, operated solely as a viable cattle ranch. Hence,

discovering that he lacked sufficient water to grow crops or grapes, failing to succeed in his residential development plans, and faced with impending mortgage payments, plaintiff was forced to pursue seriously the possibility of timber harvesting, in order to attempt to keep the ranch.

In the fall of 1977, plaintiff employed the firm of Hammon, Jensen, Wallen and Associates, professional foresters, which prepared a timber inventory of the property and a Timber Harvest Plan. That Plan involved a selective harvest of a maximum of 2.5 million board feet of timber. Although the inventory indicated that over 8 million board feet of timber existed on the property, apparently much of that footage was located in scattered patches or inaccessible areas. The Plan covered 116 noncontiguous acres on the Lake Field area of the Castro-Escondido property and would have involved the harvesting of 50% of the trees over 18 inches in diameter. An additional million board feet could have been harvested again in ten years. The logging would have required approximately 300 trips by truck during a six-week or longer period in the summer months to the sawmill in Santa Cruz County. The project would have required the construction of 700 feet of new road, the installation of culverts and the grading of trails and log landings.

Pursuant to the California Z'berg-Nejedly Forest Practice Act of 1973, Cal. Pub. Res. Code §§ 4511 *et seq.*, plaintiff submitted this timber harvesting Plan to the State Department of Forestry. After inspecting the property, the Department approved the Plan on September 8, 1978.

On December 15, 1978, plaintiff entered into an agreement with Big Creek Lumber Company whereby plaintiff agreed to sell and Big Creek agreed to harvest 2.5 million board feet of redwood timber under the timber harvest Plan approved by the California Department of Forestry. Under the contract, plaintiff was to receive a fixed price of $325 per thousand board feet of redwood

timber harvested.[2] Hence, plaintiff would have realized approximately $812,000 from the contract. Considering further the harvest of one million board feet which could have been repeated in ten years, the timber harvesting would have yielded an annualized income of approximately $82,000. The Timber Sale agreement was conditional upon a use permit satisfactory to Big Creek being obtained from the County.

Plaintiff reserved title to the lumber until the permit should be obtained and the timber harvested. The timber sale agreement was to extend until April 1, 1981, except that this period was to be enlarged by one year to April 1, 1982, if permits for timber harvesting had not been procured by June 1, 1979. During 1978 and 1979, in order to meet his obligations under the mortgages, plaintiff borrowed $500,000 from Wells Fargo Bank on the security of the timber contract. Big Creek advanced plaintiff $200,000 on the contract.

On April 12, 1976, the County enacted an ordinance to regulate timber harvesting and related operations pursuant to authority granted under the Z'berg-Nejedly Forest Practice Act, which allows counties to adopt rules and regulations that are stricter than those promulgated under the Act. Cal. Pub. Res. Code § 4516. The Act does not restrict the power of a county under its zoning authority to review the specific site of a timber harvest application. On May 6, 1976, the county Planning Commission passed and adopted standards for such operations, which were amended on April 6, 1978. Under the ordinance and standards, timber harvesting required a use permit.

In September of 1978, plaintiff applied for this use permit. Defendant's Central Permit Office declared the permit complete on October 23, 1978. Yet, despite the fact that plaintiff's application was to have been agendized for a public hearing before the appropriate public agency within 45 days of that date, the County did not act upon the application until June 12, 1979. Action or plaintiff's application was delayed pending the outcome of a

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[2] At present, the value of timber has fallen to approximately $150 per thousand.

timber harvest application submitted by the California Province of the Society of Jesus (Noviate application).

On June 12, 1979, having analyzed plaintiff's timber harvest plan, the County Planning Department staff issued a report which concluded that the proposed harvest would have no significant adverse environmental and safety impact that could not be mitigated. The staff specifically analyzed any potentially injurious effects upon water resources and traffic safety. They suggested that the former could be adequately mitigated by the imposition of appropriate conditions and the proper enforcement thereof; the latter could be mitigated by the use of experienced truck operators, a flag vehicle, adequate turnouts and restrictions on hours of operation. The staff recommended a negative declaration pursuant to Cal. Pub. Res. Code § 21064.

However, during the time that plaintiff's application for a use permit was thus pending, a member of the county Board of Supervisors suggested that timber harvesting be banned from the County. Although the Planning Commission considered this proposal, it was unable to agree whether or not to adopt it.

On August 6, 1979, the Board of Supervisors considered the proposed ban and voted four to one to prohibit commercial timber harvesting as a "nuisance" and to permit the cutting of trees only to salvage timber after a fire and the cutting of fallen trees for domestic use. Thereafter, the Board directed the county counsel to prepare an ordinance formally banning commercial timber harvesting and further directed the Planning Commission to revise the standards for harvest permits. During December and January, the supervisors conducted several hearings concerning the proposed harvest ban but did not formally adopt the ordinance. On January 21, 1980, the Board adopted an interim ordinance prohibiting new applications.

On August 16, 1979, on the basis of the Board's newly-declared policy against timber harvesting, the county Planning Commission staff reversed its June recommendation concerning plaintiff's operation and instead recommended denial of the application,

although the substance of the report involving impact and mitigation remained unchanged.

On September 6, 1979, the Planning Commission conducted a hearing on plaintiff's application. Witnesses included Phillip E. Nemir and Dale Holderman, registered foresters; and William McKillop and Paul Zinke, Professors of Forestry at the University of California. All witnesses urged that the application be granted and testified that the proposed selective harvest would have a salutary effect upon the environment and would benefit the public as a whole. No evidence was presented to the contrary. At the hearing, the county counsel stated that the Planning Commission, in making its decision, could consider the articulated policy of the Board. The Planning Commission denied the application. The following findings were sent to the Board of Supervisors:

> 1. That the Commission was not satisfied that the potential adverse impacts determined in the environmental assessment could be mitigated;
>
> 2. That the proposed use of this property is not essential or desirable to the public convenience or welfare in that the potential impacts would not be mitigated;
>
> 3. That the proposed use would be detrimental to the public health, safety and general welfare in that the potential adverse impacts could not be mitigated.

Plaintiff appealed this decision to the County Board of Supervisors, which held a *de novo* hearing on the application on October 15. Plaintiff requested the Board to delay hearing until it had formally acted on its proposed ordinance, but the Board refused to grant a continuance. Again, all witnesses, including Professors McKillop and Zinke, urged that the proposed harvest application be granted and testified that the harvest would not have an adverse effect on the environment but would be beneficial to the land and wildlife and would be of economic and social benefit to the county. This testimony notwithstanding, several Board members expressed their concern with the particular dangers of plaintiff's project, including the traffic hazards and threat to water

resources and steelhead spawning. By a vote of four to one, the Board denied the application.[3]

Subsequently, on February 22, 1980, plaintiff filed a complaint in state superior court, seeking by administrative mandamus, Cal. Civ. Proc. Code § 1094.5, to set aside the determination of the Board. Plaintiff did not raise, nor did the court adjudicate, plaintiff's constitutional claim; rather, plaintiff's action alleged violations of zoning and administrative law. The trial court ruled that the Board's decision was supported by substantial evidence, that plaintiff was not denied a fair hearing, and that the plaintiff had waived any claim that the permit was granted by operation of law. The court entered judgment for the county on December 4, 1980.

Plaintiff thereupon filed both an appeal and a petition for writ of mandate in the court of appeal. That court denied the petition but the Supreme Court granted hearing and retransferred the

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[3] The Board made the following findings:

1. The proposed use of the property would be detrimental to the public health, safety and welfare in that the project presents a significant risk of degradation of water resources in the Bodfish Creek and Hatfield Creek watershed area. It has not been established that this adverse impact can be effectively mitigated to less than significant levels.

2. The proposed use of the property would be detrimental to the public health and safety in that the introduction of logging trucks into the area would present a significant safety hazard to users of the Hecker Pass Highway (State Route 152) and Mount Madonna Park. This adverse impact cannot be significantly mitigated.

3. The proposed use of the property will be detrimental to the public health and safety in that the timber harvest operation will significantly increase the risk of fire in the area. The proposed mitigation measures would not reduce this risk to less than significant levels.

4. The proposed use of the property is neither essential nor desirable for the public convenience or welfare in that the proposed project presents significant risks of environmental damage and hazards to the public health, safety and welfare without any overriding benefit to the citizens of the County of Santa Clara.

matter to the court of appeal with a directive that the writ issue. The court of appeal denied the petition for writ of mandate, finding that the Board had considered plaintiff's application on the merits, as was evidenced by the specific concerns articulated by several Board members, and had not denied the permit on the basis of an unenacted policy to prohibit timber harvesting. It held further that, in light of the potential adverse environmental impacts identified in the Planning Commission staff report, plaintiff had the burden of proving to the satisfaction of the Board that effective mitigation would indeed take place. The court averred that, despite the fact that no witnesses testified against the application, the Board was entitled to take a skeptical view of whether the mitigative actions would in fact be taken and whether forestry officials would indeed enforce full compliance. The Board, the court continued, was not required uncritically to accept the opinions of plaintiff's experts and of the planning staff that mitigative efforts would be effective merely because no contrary testimony was presented; instead the Board could disbelieve even uncontradicted testimony if the testimony is inherently improbable or if the witness has an interest in the matter. The court noted that the Board found it improbable that the mitigation procedures would be properly effectuated and that forestry officials would effectively police the project. The court emphasized that, had plaintiff presented evidence that similar operations had been carried out by the same logging company under similar permit conditions and supervision and that mitigation efforts had succeeded, the Board could likely not have rejected the application without actual counterevidence. However, the court stated that plaintiff's witnesses did not provide such factual support for their opinions.

On March 11, 1982, the California Supreme Court denied a petition for hearing filed by plaintiff. On September 13, 1982, the California Court of Appeal dismissed the appeal from the decision of the trial court.

Ultimately, the county did not adopt the proposed ordinance banning commercial timber harvesting. The California State

Board of Forestry opposed the ordinance, finding it "very restrictive" and likely "to foreclose opportunities to harvest timber which would be economically and environmentally desirable." The State Board noted that its experience, and that of other counties in heavily populated areas, indicated that "less preclusive methods" could be implemented to control any possible adverse impacts. It urged that a continuous long-term supply of forest products is essential to the public interest and that the land upon which harvestable timber lies can provide an "economically self-supporting forum of open space land use." By memorandum of April 29, 1980, county counsel advised the Board that the proposed ordinance would be unlawful, inasmuch as there was not sufficient evidence to justify the outright banning of commercial timber harvesting. He acknowledged that

> the overwhelming weight of the evidence presented at public hearings, supported by the State Department of Forestry, is that a managed timber harvest conducted in accordance with a plan approved by the Department of Forestry is beneficial to the forest and would not be injurious to the environment. This evidence has been presented by professional foresters and educators in the field of forestry and is essentially uncontradicted.

On May 5, 1980, the Board voted not to adopt the ordinance.

In the meantime, plaintiff, finding himself unable to sustain the heavy ownership and operation costs of the three ranches—particularly the former—was forced to sell the ranches and the options. On October 3, 1979, before the Board of Supervisors had acted on plaintiff's appeal from the Planning Commission, the Bloomfield Hereford Ranch Corporation entered into an agreement to sell the entire property to C.M. Trading Co. for a sale price of $7,201,524. The uncontradicted evidence at trial indicated that, pursuant to this sales agreement, plaintiff retained ownership of the 2.5 million board feet of harvestable redwood timber subject to the December 15, 1978, contract with Big Creek until June 1, 1982.[4] Plaintiff received no

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[4] The agreement contained the following covenant:

compensation for this timber from C.M. Trading Co. The transaction was closed on October 22, 1979. As of June 1, no timber had been harvested, and plaintiff's right therein expired without his having received any compensation. The denial of the timber permit reduced the value of the combined ranches by approximately $1,000,000.

Bloomfield was dissolved in April of 1980, and plaintiff personally assumed its assets and liabilities, including its rights of action against Santa Clara County.

Although plaintiff sold the ranches at a higher price than that which he paid, he in fact lost money during his ownership of the lands, when the mortgage payments and expenses of operation and improvements are considered. Such losses, however, were not completely unforeseeable, and as such, constitute a part of the risk of speculative investment and subsequent ownership. Plaintiff intially purchased the Castro Valley-Escondido ranches for Triad Corporation for the purpose of realizing a long-term appreciation on the investment. In light of the purchase price and the concomitant mortgage payments and property taxes, plaintiff must have anticipated from the outset that the ownership expenses, especially including those just mentioned, could not be carried by the profits of a cattle grazing or raising operation. At $2,700,000, it is simply incredible that plaintiff would have purchased the land *for*

> CM acknowledges the Timber Sale Agreement dated December 15, 1978, between Seller and Big Creek Lumber Co. . . . and agrees to allow Big Creek to harvest timber from the Castro Valley Ranch in accordance with the terms of that Agreement until October 1, 1982 when all timber harvesting shall have been completed and all obligations to restore the property shall have been fulfilled. Seller and MacLeod shall be entitled to the net proceeds of such timber harvesting after payment of any expenses incurred by CM, as the owner of the property under the terms of said Agreement, as a result of said harvesting or due Big Creek under the terms of said Agreement. CM has no responsibility to assist Seller, Big Creek or MacLeod in their efforts to obtain the required permits. If such permits are not obtained by June 1, 1982, all rights of MacLeod, Seller and Big Creek pursuant to said Agreement and to harvest said timber shall terminate.

the purpose of cattle raising. At that price, plaintiff must have contemplated that Triad would retain the land for some number of years, satisfying the mortgage payments from resources other than the cattle operation, and would finally subdivide the property or sell the ranches at a substantial profit to some developer who would do so. Such a plan, however, is inevitably fraught with risk, *e.g.*, the risk that the real estate market will suffer a depression or that the governing body will not rezone the land or permit economically feasible subdivision therof. In the instant case, those risks were exacerbated by the fact that plaintiff became the sole owner of the ranches and was forced to bear the ownership expenses individually.

Although at trial, plaintiff asserted that the cattle industry had suffered a depression in 1974-1980,[5] making a cattle operation impractical, plaintiff acknowledged that a cow-calf operation in mountainous terrain like that of the Castro Valley-Escondido ranches "is always a losing operation." R.T. 81. When asked by counsel for defendant why, if he was generally familiar with the cattle business, did he attempt such an operation on the lands, plaintiff obscurely remarked that:

> This ranch had been used historically as a cow/calf unit ranch. And until you have actually grazed your own cattle on there and see what kind of feed you got and what kind of water and what kind of summer hay, et cetera, you never know.
>
> Secondly, the price of your cows vary from A to Z all the time. 1974 to 1980 were real depression years in the cattle business. We wanted to see if we could make money on it.

R.T. 104. But plaintiff could *never* have supported Castro Valley-Escondido, nor those ranches and Bloomfield combined, on the basis of a cattle operation. Had he been permitted to harvest the timber ($82,000/year), in addition to a cattle operation, he would have been able to meet the immediate operation and maintenance

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[5] Plaintiff did not introduce evidence quantifying the extent of this alleged depression.

expenses, including taxes and insurance, but he would *not* have been able to satisfy the mortgage payments of capital and interest, as well as other expenses of ownership. At most, the timber harvest would have enabled plaintiff to mitigate his losses.

III.

CONCLUSIONS OF LAW

A. Standing

We find that plaintiff has standing to bring this action. First, plaintiff is the successor in interest to and owner of the assets of the dissolved Bloomfield-Hereford Ranch Corporation. He has assumed all its rights and liabilities, including the cause of action asserted here. Plaintiff has standing by virtue of that assignment. *See Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207-08 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976) (an association may sue as an assignee of the legal rights of its members); *Isidor Weinstein Investment Co. v. Hearst Corp.*, 303 F. Supp. 646, 648-49 (N.D.Cal. 1969) (corporation's successor in interest could assert assigned antitrust claims). Plaintiff is not attempting to assert the corporation's cause of action in the capacity of a stockholder. *Cf. Erlich v. Glasner*, 418 F.2d 226 (9th Cir. 1969).

Second, plaintiff is challenging the County's denial of his application for a use permit. The County's failure to issue such a permit restricted plaintiff's ability to dispose of or utilize his property to the fullest extent possible. Plaintiff would have been able to sell the timber on his land to Big Creek Lumber but for the absence of the use permit. He did not convey the rights to the trees to C.M. Trading Co. when he transferred title to the land, and his rights in the timber expired without his having received compensation therefor because of the absence of the use permit. He therefore has suffered individualized injury such that he has a "personal, concrete, live interest in the controversy." *Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979), *citing Baker v. Carr*, 369 U.S. 186, 204 (1962). The fact that plaintiff does not presently

have an interest in the timber is not relevant to the threshold issue of standing.[6]

B. *Res Judicata* and Collateral Estoppel

The doctrines of *res judicata* and collateral estoppel may be applied to prior state court judgments to bar subsequent civil rights actions brought in federal court. *Allen v. McCurry*, 449 U.S. 90 (1980). The preclusive effect of a state court judgment is determined by the law of the state. 28 U.S.C. § 1738. However, bar is limited to cases where there was a "full and fair opportunity to litigate" the issue in the earlier state court case, 449 U.S. at 95, and "where the state courts have recognized the constitutional claims asserted." *Id.* at 99. Under the doctrine of *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims or issues that were or could have been raised in that action. *Id.* at 94.

Under California law, in order to determine whether a prior action serves to bar a subsequent action, a court must ascertain

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[6] Therefore, for purposes of the standing doctrine, we need not determine whether the timber became "constructively" severed from the land by virtue of either the Big Creek or the CM Trading contracts. Defendant has argued that, under the CM contract, plaintiff retained only the speculative right to receive the proceeds if the timber were harvested by Big Creek. Defendant contends that loss of such an interest constitutes, at best, consequential damages, which cannot form the basis of a fifth amendment takings claim. We do not agree. If defendant's position were correct, *no one* would have standing to assert the present cause of action. Because no permit was issued, Big Creek never had a present interest in the timber or an obligation to pay for it. Its right to purchase the timber would not have conferred standing. *Omnia Co. v. United States*, 261 U.S. 502 (1923). Furthermore, the evidence is uncontradicted that plaintiff reserved the timber from the sale of the property. CM did not acquire the right to the timber until June 1, 1982. Throughout the relevant time period, plaintiff alone had a present property interest in the timber. The transactions were arranged such that plaintiff bore the risk and the economic burden of the county's actions, and he is the proper party to challenge the denial of the use permit.

whether the same "primary right" is involved in both actions. In doing so, a court is to examine the harm suffered, rather than the particular theory asserted or relief sought by the litigant. *Slater v. Blackwood,* 15 Cal. 3d 791 (1975). Defendant asserts that only one cause of action is involved herein, which arises from a single injury, that is, the denial of a use permit. Defendant maintains that the mandamus and the section 1983 actions are but different theories seeking different remedies for the same wrong.

We disagree. In the mandamus proceeding, the court determined whether the County's decision was based upon "substantial evidence" of possible harm to the environment. It did not adjudicate whether the denial had deprived plaintiff of all viable use of his property, that is, whether the regulation went so far as to constitute a taking for which compensation must be paid. As the County argued before the state court, "administrative mandamus . . . is concerned with the jurisdictional basis for the decision and the procedures observed in rendering it, not the financial impact of the decision upon the interested party." Pl. Exh. 35, p.5. The proper analysis of a takings claim requires the court to inquire into the nature and extent of interference with the plaintiff's rights and to determine whether justice and fairness require that plaintiff's loss be compensated by the government. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). Neither the Board of Supervisors, nor the California courts, engaged in such an analysis. The inquiry in the mandamus action differed qualitatively from that required in the case at bar.

Therefore, it is clear that plaintiff's section 1983 claim was not in fact litigated in the state court proceedings, nor, under California law, could it have been so litigated under the facts of this case. Concededly, plaintiff may have been able to raise his federal claim as part of the administrative mandamus action. Judicial review of the validity of an administrative action is governed by Cal. Civ. Proc. Code § 1094.5. A constitutional challenge which seeks to *invalidate* a specific application of an ordinance is properly raised in California in an action for declaratory relief or mandamus. *See Agins v. City of Tiburon,* 24 Cal. 3d 266, 273 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980); *State of*

California v. Superior Court (Veta), 12 Cal. 3d 237, 251 (1974). However, under California law, plaintiff had no obligation to present his federal constitutional claim to the Board of Supervisors, Cal Gov 't Code § 905.1,[7] and did not do so. A mandamus proceeding is limited to determining "the validity of any final administrative order or decision," section 1094.5(a); review does not extend to matters which were not before the administrative body. *Markley v. City Council*, 131 Cal. App. 3d 656, 663 (1982); section 1094.5(e). Therefore, having declined to raise the inverse condemnation claim before the administrative body, the plaintiff in this case could not have raised his constitutional claim as part of the mandamus proceeding, although perhaps, at plaintiff's option, he could have joined an action for declaratory relief with the mandamus action.[8]

The California courts themselves have recognized the limited scope of administrative mandamus proceedings and have declined to give such actions broad *res judicata* effect. *See, e.g., San*

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[7] Section 905.1 provides:

> No claim is required to be filed to maintain an action against a public entity for taking of, or damage to, private property pursuant to Section 19 of Article 1 of the California Constitution.
>
> However, the board shall, in accordance with the provisions of this part, process any claim which is filed against a public entity for the taking of, or damage to, private property pursuant to Section 19 of Article 1 of the California Constitution.

Although section 905.1 applies explicitly only to inverse condemnation claims brought under the state constitution, we shall presume, and defendant has offered no authority to the contrary, that federal condemnation claims similarly need not be brought before the administrative agency.

[8] Certainly, plaintiff could have brought his section 1983 action in state court in the first instance; however, an aggrieved person has the right to bring his or her federal cause of action in federal court if he or she so chooses.

We conclude, on the basis of the above discussion, that the doctrine of collateral estoppel similarly does not bar the plaintiff's claim. Collateral estoppel applies only with respect to specific issues which were actually litigated and decided in a previous action.

Francisco Unified School Dist. v. State of Calif., 131 Cal. App. 3d 54 (1982); *Markley, supra,* at 674-75. In *Markley,* the court stated:

> Certainly the effect of an affirmance of the judgment below and denial of a writ [of mandamus] does not create any res judicata effect or estoppel by judgment on the right of the petitioner to file a new and plenary action for damages.

Id.

Furthermore, had plaintiff brought his section 1983 claim in the mandamus proceeding, he would not have been able to secure an adequate remedy therein; California does not "recognize the constitutional claim" for just compensation. The California Supreme Court has ruled that *money damages* are not available in claims for inverse condemnation; instead, a plaintiff must seek a declaration that the contested regulation is invalid. *See Agins, supra.* In *Agins,* the California Supreme Court held that a property owner aggrieved by a local land use regulation "may not elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." 24 Cal. 3d at 273. Hence, *Agins* would preclude monetary relief for an uncompensated regulatory taking claim raised in state court under section 1983. *Gilliland v. County of Los Angeles,* 126 Cal. App. 3d 610, 617 (1981).

However, "the present vitality of this aspect of *Agins* has been substantially undercut by Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 636-661 . . . (1981), in which Justices Stewart, Marshall and Powell joined." *Martino v. Santa Clara Valley Water District,* No. 81-4578, slip. op. at 1575 (9th Cir. Apr. 14, 1983). Justice Brennan stated:

> The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a "taking" and recover just compensation if it does so.

Id. at 660. He suggested that, once a court determines that a regulation results in a "taking," the governmental body must pay just compensation for the period commencing on the date the regulation first effected the taking and continuing until the entity either rescinds or amends the regulation. *Id.* at 658. Under such a constitutional rule, a property owner would receive monetary relief for the period during which the regulation was in place. Under the California rule, the governing body could repeatedly amend its regulation, thereby continuously frustrating the plaintiff's right to relief. Justice Rehnquist, concurring, remarked that, if he could agree that the appeal were from a "final judgment," he "would have little difficulty in agreeing" with much of Justice Brennan's opinion. *Id.* at 633. Thus, as *Martino* noted, it appears that a majority of the Court may agree that "damages *are* recoverable for inverse condemnation." Slip. op. at 1576. *See also In re Aircrash in Bali, Indonesia, On April 22, 1974,* 684 F.2d 1301, 1311 n.7 (9th Cir. 1982).

In light of this unsettled state of federal law, which seems to tend towards a rejection of *Agins,* we cannot say that "the state courts [would] have recognized the constitutional claims asserted and provided fair procedures for determining them." *Allen v. McCurry, supra,* at 99. Hence, we are unwilling to conclude that the previous administrative mandamus proceeding operates to preclude plaintiff's federal court action. A civil rights action cannot be barred by the judgment of a state court which does not fully recognize the claim. Had plaintiff presented his claim to the state courts, he would have been forced to sacrifice any possibility of fair compensation, the only remedy which would rectify his alleged harm. Had he sought to embroil this court in a local zoning controversy by bringing his state law claims in the first instance to the federal forum (under its pendent jurisdiction), this court would likely have abstained. *See Santa Fe Land Imp. v. City of Chula Vista,* 596 F.2d 838 (9th Cir. 1979); *Sederquist v. City of Tiburon,* 590 F.2d 278 (9th Cir. 1978).

C. The Takings Claim

1. The Nature of the Property Interest

In order to determine whether or not Santa Clara County's denial of the timber harvesting permit constituted a taking of plaintiff's property, the court must first identify the "property" at issue. In the instant case, the property may be characterized as the standing timber itself, the timberlands, the Castro Valley-Escondido Ranch, or the entire 8300 acres, comprising all three ranches.

For purposes of fifth amendment just compensation analysis, a federal court will refer to state law to define rights in property. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency,* 561 F.2d 1327, 1330 (9th Cir. 1977). Plaintiff contends that, under California law, he owned a protected property interest in the standing timber. In California, standing timber is ordinarily regarded as "affixed to land," Cal. Civ. Code § 660, and therefore part of the real property. Section 658. However, timber "agreed to be severed before sale or under the contract of sale, shall be treated as goods." Sections 658, 660. "[G]rowing crops which are agreed to be severed under a contract of sale cease to be a part of the realty and become personalty. Under these circumstances, in substance, a constructive severance . . . occurs." *Carey v. Glenco Citrus Products,* 235 Cal. App. 2d 572, 578-79 (1965). Such a constructive severance may result either from a conveyance of standing timber or other crops, or from a conveyance of land with a reservation of the crops. *Smith v. Baker,* 95 Cal. App. 2d 877, 878 (1950). A separate estate in timber may be limited to a term. *Palmer v. Walker,* 133 Cal. App. 2d 705, 711 (1955).

On the basis of such authority, plaintiff argues that a "constructive severance" was effected by the Timber Sale Agreement between plaintiff and Big Creek Lumber and again by the contract of sale of the ranch to C.M. Trading Co. Under the latter contract, the ownership of land and timber were separated. Alternatively, plaintiff argues that the timberlands themselves should be considered separately from the remainder of the ranch land. Depriving him of the right to harvest the timber, plaintiff urges, effectively deprived him of all viable use of these lands.

We assume, without deciding, that the C.M. Trading Co. contract effected a "constructive severance" of the timber and that the 116 acres of timberland in the Lakefield area had no viable use other than that of timber harvesting. However, for the reasons stated below, this conclusion is not determinative of the matter at hand. The impact of the timber permit denial must be considered, in any case, in relation to the Castro Valley-Escondido ranch land as a whole. The timberlands were acquired as a part of the above Ranch, were zoned identically to the remainder of the Ranch, were first leased, and later sold, with the Ranch as a whole. When acquiring the Ranch in 1974, plaintiff did not explicitly intend to develop the Lakefield timberlands separately. In light of these circumstances, plaintiff will not now be permitted to isolate these lands and their timber for purposes of his taking claim. *Compare* the instant case *with American Savings & Loan Ass'n v. County of Marin,* 653 F.2d 364 (9th Cir. 1981) (for taking purposes, all plaintiff's land to be considered a single parcel where ordinance had isolated a portion of the property in a unique zone). By contrast, we will not include the potentiality of the Bloomfield Ranch in our analysis. Bloomfield was acquired separately, is zoned differently and has a different overall topography from that of Castro Valley-Escondido. The difference in zoning alone indicates that the County views the ranches differently. Plaintiff's contiguous ownership of Bloomfield is somewhat a fortuity.

2. Standard of Review

Modern "takings" jurisprudence involves a balancing of several factors in an "essentially *ad hoc* inquiry." *Penn Central, supra,* at 124. The Court has identified several considerations to be weighed in determining whether " 'justice and fairness' require that economic injuries caused by government action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* These factors include:

(1) the economic impact of the regulation;

(2) its interference with reasonable investment-backed expectations;

(3) the character of governmental action.

Id. A land use regulation effects a taking if it does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land." *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980) (emphasis added). Generally, the inquiry concerning the extent of a regulation's interference with a private property right has focused on the use of the property that is permitted. *See Andrus v. Allard,* 444 U.S. 51, 65-66 (1979); *Penn Central, supra,* at 131, 136. The mere fact that a regulation reduces the value of land does not constitute a taking. *See, e.g., Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

In the instant case, a determination that plaintiff had had a property interest in the standing timber is relevant but not dispositive. We are still obliged to undertake the *ad hoc* analysis previously noted. The existence of plaintiff's property interest is merely one consideration in the balancing process. Hence, plaintiff's argument proves both too much and too little. On the basis of plaintiff's theory, any home owner could enter into a contract to sell the "timber rights" to any single tree on his residential lot, despite city and county ordinances forbidding, without a permit, the cutting of trees over a certain diameter in residential areas. The mere fact that one "constructively severs" certain goods, or, indeed, portions of real property, and then is completely denied permission to dispose of that contrivedly limited property, whether by zoning regulations or otherwise, cannot suffice to establish a taking. The courts are not required to adhere to such a mechanistic approach; indeed, to do so would represent an abdication of our duty. Instead, we are required to pierce through to the realities of the situation.

It is true that, had the County itself harvested the timber or had the County condemned the timberlands as parkland, the loss of the trees or timberlands would be specifically compensable. *See United States v. 3,035.73 Acres of Land, Etc.,* 650 F.2d 938, 941 (8th Cir. 1981) (court awarded compensation for condemned forest land in part to the holder of an "Option to Purchase Standing Timber" since optionee had a present right to enter land and cut and remove timber); *State of Louisiana Sabine River*

Authority v. Carter, 293 F.Supp. 1171, 1172 (W.D.La. 1968) (where condemned land was subject to 99-year timber lease, of which 76 years were unexpired, both the landowner's and lessee's rights were expropriated). However, the analyses of such cases are not directly applicable to the instant situation, since

> In condemnation cases the issue is damages: how much is due the landowners as just compensation. In inverse condemnation, the issue is liability: Has the government's action effected a taking of the landowner's property. In the latter, the boundaries of the property taken must be determined by taking jurisprudence rather than the law of eminent domain.

American Savings & Loan, supra, at 369. In actions for eminent domain, the apportionment of property interests is relevant, indeed crucial, to the inquiry concerning whom should receive compensation for which portion of the "bundle" of property rights that have been taken.

Thus, there is a distinction between cases involving regulatory actions and those involving a physical invasion where an owner has been displaced from his property. Where there has been a direct appropriation of property, *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980); or a physical invasion, *Loretto v. Teleprompter Manhattan CATV Corp.,* 102 S.Ct. 3164 (1982); *Kaiser Aetna v. United States,* 444 U.S. 164 (1980), or where the owner has been physically excluded from any use of the property, *Foster v. United States,* 607 F.2d 943 (Ct.Cl. 1979); *Devines v. Maier,* 665 F.2d 138 (7th Cir. 1981), the issue again is the value of the specific property interest which has been taken. Indeed, cases of physical invasion constitute *per se* a taking of property, regardless of the amount by which the overall parcel has been reduced by the action. *Loretto, supra.* The identification of such takings does not require the same balancing of factors enumerated in *Penn Central.*

The case at bar does not involve such invasion or appropriation, but rather regulatory action of a non-intrusive nature. In such a context, a property owner will not be permitted to divide his property into separate elements in order to determine whether

specific rights have been completely abrogated. Instead, the determination must be made on the basis of governmental interference with rights in the parcel as a whole. *Penn Central, supra.* In *Penn Central,* the city of New York had denied plaintiffs permission to erect a 55-story office building atop Grand Central Station on the basis of a law enacted to preserve and protect historic landmarks. The plaintiffs had argued, *inter alia,* that the airspace above the terminal was a valuable property interest and urged that the landmarks law had deprived them of any beneficial use of those air rights, "irrespective of the value of the remainder of their parcel." 438 U.S. at 130. In rejecting this contention, the Court did *not* hold that "air rights" were not property interests under New York law, but rather stated:

> [T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, *see Welch v. Swasey, supra,* but also in approving those prohibiting both the subjacent, *see Goldblatt v. Hempstead,* 369 U.S. 590, . . . (1962), and the lateral, *see Gorieb v. Fox,* 274 U.S. 603, . . . (1927), development of particular parcels. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Id. at 130-31.

In analyzing the parcel as a whole, the Court determined that there had been no taking, premising its holding on several factors: First, the landmark law did not interfere with the then-present uses of the parcel; rather, the property owners "could continue to use the property precisely as it [had] been used for the past 65

years[,]" *id.* at 136; that is, the law did not "interfere with what must be regarded as [the owners'] primary expectation regarding the use of the parcel." *Id.* Second, and "[m]ore importantly," *id.*, the property owners were able to obtain a "reasonable return" on their investment. *Id.* Third, Penn Central had received compensatory development rights for other properties it owned. Fourth, the City had not prohibited *all* construction above the Terminal, but merely a project of that enormity.

We conclude that the analysis and reasoning of *Penn Central* must control in the instant case. Plaintiff's contention to the contrary notwithstanding, the "extension" of *Penn Central* to the present facts does not require an overruling of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). In *Pennsylvania Coal,* a mining company had conveyed the surface rights to particular land but expressly reserved the right to remove coal thereunder. The grantee waived all claims for damages resulting from the mining operations. A Pennsylvania statute, subsequently enacted, forbade the mining of coal in such a way as to cause the subsidence of a residential structure if the surface was not owned by the owner of the underlying coal. The Court held the statute invalid as an unconstitutional exercise of police power, in that it effectively abolished what was recognized in Pennsylvania as an estate and destroyed binding contractual rights. The right to coal, the Court noted, "consist[ed] in the right to mine it," *id.* at 414, and to render the mining thereof commercially impracticable effectively destroyed or appropriated that right.

In *Pennsylvania Coal,* however, the contract had been consummated prior to the enactment of the ordinance. Hence, the coal company had relinquished valuable property rights in the surface with the reasonable, "investment-backed" expectation of continuing to extract the subsurface coal. Furthermore, the grantees had voluntarily assumed the risk of subsidence. Hence, when considering the question "upon whom the loss of the changes desired should fall," *id.* at 416, the Court held:

> So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that

> the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Id. The Court did not rule that the effective destruction of the property interest in coal in and of itself established a taking, but rather that *under the circumstances,* the coal company had been forced to bear an unfair burden.

Our reading of *Pennsylvania Coal* is supported by *Penn Central.* In the latter case, the Court characterized *Pennsylvania Coal* as

> the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate *distinct investment-backed expectations* as to amount to a "taking."

438 U.S. at 127 (emphasis added). The Court noted further that the statute in *Pennsylvania Coal* had been enacted after the transactions. In a later footnote to its ruling concerning "air rights," the Court remarked:

> These cases [*Welch v. Swasey, Goldblatt v. Hempstead,* and *Gorieb v. Fox*] dispose of any contention that might be based on *Pennsylvania Coal Co. v. Mahon* . . . that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—i.e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a "taking."

Id. at 130, n.27. *Pennsylvania Coal,* it seems, although not overruled, is to be limited to extraordinary circumstances where the entirety of an individual's legitimate expectation/property interest has been completely destroyed by subsequent regulation. In light of *Penn Central,* however, this property cannot be artificially subdivided into "discrete segments." The court is to consider the complete bundle of a property owner's rights when engaging in the necessary *ad hoc* balancing process to determine whether governmental regulation has gone so far as to effect a taking.

Therefore, we conclude that *Penn Central,* rather than *Pennsylvania Coal,* is applicable to the case before us. And, as did the Court in *Penn Central,* we find that the governmental action at issue did not effect a taking of plaintiff's property. First, the challenged governmental act did not interfere with the historical use of the Castro Valley-Escondido land, *i.e.,* cattle raising and grazing. Plaintiff had primarily expected to use the property in this manner, while holding the land in anticipation of its ultimate appreciation.

Second, it cannot be said that the Big Creek Lumber contract and the subsequent loans plaintiff obtained on the basis thereof created reasonable investment-backed expectations. The County had promulgated its use permit requirement prior to the time plaintiff entered into the contract and borrowed the funds; he therefore was aware that County approval was a prerequisite to the consummation of the contract and payments of proceeds thereunder. Indeed, title to the timber was to pass only if this contingency were fulfilled. Hence, although plaintiff did encumber himself on the basis of his hope that the permit would be granted, he did so, assuming the risk of county non-approval. Plaintiff cannot talismanically transform such risk-assumption into the more reasonable investment-backed expectation of the coal company in *Pennsylvania Coal.* One who seeks governmental approbation must contemplate governmental rejection.

Third, the county did not, in fact, completely forbid all timber harvesting on the basis of a blanket policy against such harvesting. The state court litigation conclusively determined that the county had denied plaintiff a permit on the merits of his particular case, rather than on the basis of a *per se* interdiction. Plaintiff is barred from relitigating this issue. Plaintiff failed to satisfy the Board members that the adverse environmental impacts and traffic dangers which they feared would indeed be mitigated or obviated. The prevention of such affirmative harms is clearly within the police power of the county, and we must give substantial weight in the balancing calculus to its concerns.

The instant case does differ from *Penn Central* in that plaintiff was not able to realize a reasonable return on his investment in

the operation of the ranch lands. However, as we noted earlier, given the purchase price of that land and the concomitant mortgage obligations, the combined income from a cattle operation and timber harvesting could not have provided such a reasonable return. Plaintiff continually asserts that he had a right to an economically viable *use* of his land; but *such use did not exist.* Viability *vel non* must be evaluated in the light of the aggregate costs of ownership and operation.

At heart, plaintiff merely seeks to mitigate the losses he incurred as the result of an unfortunate concatenation of events. Had plaintiff paid a purchase price that reasonably reflected the value of a cattle operation, which operation then became infeasible due to a depression in the cattle market; had he then attempted to supplement has income through timber harvesting in order to meet ownership and operation expenses; had he been prevented from doing so by the County, with the result that he was forced to sell the land, whereas with county cooperation, he would have been able to retain and maintain the operation—we would, *perhaps,* have a different case. *See Penn Central, supra,* at 138, n.36. But plaintiff did not purchase the land with the legitimate expectation of realizing a "reasonable return" on his capital by means of cattle raising, timber harvesting, crop growing, or a combination thereof. That reasonable return was to be captured, if ever, upon subsequent sale of the land, as was evidenced by the fact that the land was not placed under the Williamson Act in order to preserve the possibility of later development and subdivision. Such is the nature of a long-term investment of that magnitude. Plaintiff cannot credibly contend, particularly with his knowledge of the cattle business, that he intended to *use* the land rather than later to sell it for a profit.

And the land *did* indeed appreciate; plaintiff did in fact sell all three ranches for considerably more than the original purchase price.[9] Admittedly, the value of Bloomfield Ranch, being the

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[9] The fact that plaintiff may actually have lost money on the transaction as a result of operational expenses and interest/mortgage payments does not change the fact that plaintiff sold the land for a profit, as that

most desirable of the three ranches, no doubt represented a disproportionate share of the ultimate purchase price paid by C.M. Trading. However, plaintiff has proffered no evidence which would indicate what proportion of that price was represented by the value of Castro Valley-Escondido. We are not required to assume that the latter not only was reduced in value by the denial of the timber permit but further did not otherwise appreciate in value. Hence, we cannot say that plaintiff did not realize a profit on that property as well. Surely, having purchased the land for long-term investment, if plaintiff was able to sell his land—although perhaps sooner than he wished—for a profit, he cannot be heard to complain of government regulatory action which allegedly reduced the value of his land. Even had the land merely depreciated in value as a result of the denial of the use permit, we could not say that a taking had resulted. The value of the timber—$1,000,000—would have reduced the value of the ranch at most by little more than a third.[10] Governmental actions which have reduced property values even more significantly have survived claims of inverse condemnation. *See, e.g., Hadacheck v. Sebastian,* 209 U.S. 394 (1915); *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Haas v. City and County of San Francisco,* 605 F.2d 1117 (9th Cir. 1979).

On the basis of the above considerations, we conclude that the county's denial to plaintiff of a timber harvesting permit did not effect a taking of plaintiff's property without just compensation.

JUDGMENT FOR DEFENDANT

Dated: September 15, 1983

ROBERT F. PECKHAM
Chief United States District Judge

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term is normally understood, *i.e.,* sale price less purchase price plus capital improvements.

[10] *If* the initial purchase price reflected the value of the timber.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No.83-2480

D.C. No.
C-82-3751-RFP

Morton P. MacLeod,
Plaintiff-Appellant,

vs.

County of Santa Clara,
Defendant-Appellee.

[Filed Jan. 22, 1985]

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding
Argued and submitted October 2, 1984

ORDER

Before: FARRIS, ALARCON, and NORRIS, Circuit Judges.

Appellant's petition for rehearing is denied.

Office-Supreme Court, U.S.
FILED
MAY 20 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MORTON P. MACLEOD,
Petitioner,

vs.

COUNTY OF SANTA CLARA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF QUESTION PRESENTED

Can a governmental regulatory action which places a restriction on the use of property form the basis of a taking claim under the Fifth Amendment in circumstances in which there has been a reasonable exercise of the police power, the property remains marketable, there has been no physical invasion of the property, and there has been no governmental interference with either the reasonable investment-backed expectations of the owner or with the historical use of the property?

TABLE OF CONTENTS

	Page
Question Presented For Review	i
Table Of Authorities Cited	iii
Statement Of The Case	2
Reasons For Denying Certiorari	4
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases

	Page
Agins v. Tiburon, 447 U.S. 255	6
Goldblatt v. Hempstead, 369 U.S. 590	5, 6
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419	5
Mugler v. Kansas, 123 U.S. 623	6
Penn Central Transportation Co. v. New York City, 438 U.S. 104	4, 5

No. 84-1657

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STATEMENT OF THE CASE

Petitioner Morton MacLeod brought this action in the United States District Court for the Northern District of California alleging that respondent County's denial of a permit to conduct a commercial logging operation on 116 acres of petitioner's 8300 acre ranch property constituted a taking under the Fifth Amendment.

As president of a real estate holding company, Triad Capital Management Holding Company, and as president and director of a subsidiary corporation, the Castro-Escondido Ranch Corporation, petitioner was responsible for the purchase in 1974 of a 7,000 acre property known as the Castro-Escondido Ranch. Petitioner anticipated an increase in value, and the property was purchased for $2,700,000 as a long term investment (Pet. App. A, p. 2; Pet. App. B, p. 17). Petitioner did not intend to exploit the timber located on the property, but he did contemplate cattle ranching as an interim use (Pet. App. A, p. 2; Pet. App. B, p. 18). The property had been used by the previous owner for cattle grazing and recreation during his 40 years of ownership (Pet. App. B, p. 17).

On January 1, 1977, under the terms of a separation agreement between petitioner and Triad, petitioner received 100% of the stock of the Ranch Corporation, valued at $1.4 million,[1] and assumed an outstanding mortgage in the amount of $1.7 million on the Castro-Escondido property. (Pet. App. A, p. 2). Subsequently, in November, 1977, petitioner bought the neighboring Bloomfield Ranch together with options on two other parcels for $2.26 million. (Pet. App. B, p. 18).

[1] The sole asset of the corporation was the ranch property.

Petitioner leased out the Castro-Escondido property for cattle grazing in 1975 and 1976 and attempted to run his own cattle operation on the property in 1977. In 1978 and 1979 the entire property was leased out for grazing purposes (Pet. App. A, p. 3).

In September, 1978, petitioner filed a use permit application with respondent for the logging of 2.5 million board feet of timber located on 116 acres of the Castro-Escondido Ranch (Pet. App. B, pp. 21-22). On September 6, 1979, the Santa Clara County Planning Commission heard and denied the use permit application on the basis that the Commission was not satisfied that the adverse impacts identified in the environmental assessment could be mitigated (Pet. App. B, p. 24).

On October 7, 1979, subsequent to the action of the Planning Commission, petitioner sold the entire ranch property to C. M. Trading Company for $7,201,564.[2] The District Court found that the denial of the use permit had reduced the value of the property by approximately $1,000,000 (Pet. App. B, pp. 27-28).

On October 15, 1979, the Santa Clara County Board of Supervisors heard and denied petitioner's appeal from the decision of the Planning Commission on the basis that the logging operation would be detrimental to the public health and safety.[3] Petitioner then filed

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[2] During petitioner's approximately 2½ years of ownership the property had a 32% increase in value ($5,360,000 to $7,201,564).

[3] The Board of Supervisors found that the proposal presented a significant risk of degradation of water resources, that the introduction of logging trucks into the area would present a significant safety hazard to users of a highway and a neighboring park, and that there would be a significant increase in the risk of fire in the area (Pet. App. B, p. 25).

an action in state court which alleged that the decision of the Board of Supervisors was not supported by substantial evidence and that petitioner had been denied a fair hearing. The trial court rejected petitioner's claims and upheld the action of the Board of Supervisors. After the trial court's decision was affirmed by the Court of Appeal, the Supreme Court denied a petition for hearing (Pet. App. A, p. 4; Pet. App. B, pp. 25-26).

At the conclusion of the state court proceedings, this action was commenced under the provisions of 42 U.S.C. §1983. The District Court held that no taking had occurred and entered judgment for respondents (Pet. App. B, p. 45). The Ninth Circuit Court of Appeal affirmed, placing principal reliance on the decision of this Court in *Penn Central Transportation Co. v. New York City* 138 U.S. 104 (1978).

REASONS FOR DENYING CERTIORARI

The opinion of the Court below is consistent with the standards set forth in this Court's decision in *Penn Central Transportation Company v. New York City* 438 U.S. 104 (1978) and presents no facts which would give rise to a new issue requiring review by this Court.

1. A single parcel cannot be divided into discrete segments in an attempt to determine if a taking has occurred, and a taking claim cannot be based on the mere diminution of value resulting from a reasonable exercise of the police power. *Penn Central*, supra, at 130-131. The permit denial in question affected only 116 out of 8300 acres and resulted in the total property's value being reduced by approximately 12%

($8,200,000 to $7,200,000). Under such circumstances, there is no basis for a taking claim by petitioner.

2. In considering whether there has been a taking, a Court must consider "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, supra, at 124, citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594. The regulatory action herein – the denial of a single application for a use permit to conduct a commercial logging operation – did not interfere in any manner with the investment-backed expectations of petitioner. The property was purchased as a long-term investment, with cattle ranching, the historical use of the property, contemplated as an interim use. The fact that petitioner was unable to exploit another use of the property is not sufficient to form the basis of a taking claim.

3. The character of the action also must be taken into consideration. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, supra, at 124.[4] Although petitioner was not permitted to conduct a logging operation at the expense of the public health and safety, he was free to use the property for other purposes and to prevent

[4] See, also, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1981), which traces the historical development of the distinction between regulation of an owner's use of property and a physical intrusion of such property.

others, including the government, from occupying or otherwise interfering with such use.

4. In light of the sale of the property for $7,200,000, petitioner's premise that the property had no "economically viable use" cannot be supported by either case law or reason.

Sale of property has been recognized as an economically viable use within the meaning of the Fifth Amendment at least since *Mugler v. Kansas*, 123 U.S. 623 (1887), quoted with approval in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), a case involving the prohibition of sand and gravel mining:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, *nor restrict his right to dispose of it*, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest . . ." *Goldblatt*, at 592 (emphasis supplied).[5]

Ultimately, the only true test of economic viability is exposure to the marketplace: if a property has value in the marketplace it has an economically viable use; if it has no value in the marketplace it is without an economically viable use. Irrespective of petitioner's managerial abilities or financial resources, an investor would not have come forward and purchased petitioner's property for $7,200,000 if it was without any economically viable use.

---

[5] See, also, *Agins v. Tiburon*, 447 U.S. 255, 263 n. 9.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
MAY 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1657

In the Supreme Court

OF THE

United States

OCTOBER TERM 1984

MORTON P. MACLEOD,
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VS.

COUNTY OF SANTA CLARA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES CITED

Case	Page
Goldblatt v. Hempstead, 369 U.S. 594	1
Mugler v. Kansas, 123 U.S. 623	1
Penn Central Transp. Co. v. New York City, 438 U.S. 104	2
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393	4

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On Petition for a Writ of Certiorari
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for the Ninth Circuit

PETITIONER'S REPLY BRIEF

THE NINTH CIRCUIT'S RULE OF DECISION IN THIS CASE IS NOT CONSISTENT WITH PENN CENTRAL

Petitioner's claim, unlike those in Goldblatt v. Hempstead, 369 U.S. 594 (1962), and Mugler v. Kansas, 123 U.S. 623 (1887), is not based upon a complete prohibition of a single use, the most beneficial use or even a diminition of value (cert. pet.

p. 10). Petitioner does not, therefore, seek to segment the property for determination of his taking claim. Timber harvesting was the only use anywhere on the property capable of generating a net income over and above the incremental expense of operation (App. B, pp. 29-30). It is irrelevant that timber harvesting could occur on only the timbered portions of the property because no permitted use of the balance of the property was economically gainful (App. B, pp. 19-20, 29).

Denial of the right to develop the property in Penn Central was upheld not because the owner sought development of only the air space over the Terminal but because the property as a whole retained a presently available gainful use (Penn Central Transp. Co. v. New York City 438 U.S. 104, 138 n. 36 (1978)). That is not the case here.

PETITIONER'S FORCED SALE OF THE PROPERTY WAS NOT AN ECONOMICALLY VIABLE USE AND MERE MARKETABILITY OF PROPERTY AFFORDS NO PROTECTION AGAINST OVER-REGULATION.

Petitioner lost money owning the ranches because the "ownership and operation costs" exceeded the appreciation (App. B, p. 27). Hence, sale of the property was no more economically gainful to petitioner than cattle operations were (id., p. 29); sale of the property afforded no substitute economically viable use but was simply the means of putting an end to petitioner's losses[1].

---

1 The sale price for all three ranches ($7.2 million) is beside the point because the "property" for Fifth Amendment purposes was found to be only the Castro Valley and Escondido ranches (App. B, p. 37); these ranches were less valuable than petitioner's third ranch, the Bloomfield ranch which was not part of the property but was part of the sale. The Bloomfield ranch represented "a disproportionate share of the ultimate purchase price paid by [the buyer]" (App. B, pp. 44-45).

If government can, without compensation, prevent all available present uses which are gainful then there is no check on regulation by virtue of the Just Compensation clause and people without independent means to sustain a money-losing property are driven from ownership. This jettisons any protection from the Just Compensation clause against exercises of the police power which go "too far" (Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

Respectfully submitted,

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